IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

Crl.MC.No. 2178 of 2006(B)

CC.682/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, KODUNGALLUR

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PETITIONER: ACCUSED NO. 3 &4

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1. PRAFULLA BHUPATRAI GANDHI,
   W/O.BHUPATRAI M.GANDHI, 1001, GREAT EASTERN
   HEIGHTS, MARVE ROAD, MALAD (WEST), MUMBAI-400 064.

2. ALPA B.GANDHI, D/O.BHUPATRAI M.GANDHI,
   DO. DO.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENTS: STATE AND COMPLAINANT

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1. STATE OF KERALA, REPRESENTED BY
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
   ERNAKULAM.

2. RADESHYAM GOGRAJ KEJRIWAL,PROPRIETOR,M/S
   PRATIK ENTERPRISES,R/AT A/51,SHANTI APARTMENTS,
   CHARKOP VILLAGE,KANDIVLI(WEST)MUMBAI-400 067,REP.
   BY P/AT HOLDER, V.K.MATHEW,S/O.KURUVILA,MANAGER,
   M/S.PRATHIK ENTERPRISES,IV/109B,PUTHIYAKAVU,MATHI-
   LAKOM(P),PAPPINIVATTOM(V),KODUNGALLUR THRISSUR DT.

BY ADV. SRI.M.AJAY
PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 28/11/2006, ALONG WITH CRMC NO. 2179 OF 2006, CRMC NO. 2180 OF 2006 & CRMC NO. 2181 OF 2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.Nos.2178, 2179, 2180 & 2181 of 2006

Dated this the 28th day of November, 2006

ORDER

The petitioners are accused 3 & 4 in four identical prosecutions under Section 138 of the N.I Act. The 1st accused facing the prosecution is a private limited company. The 2nd accused is the director of the company, who has signed in the cheque. The petitioners-accused 3 & 4, are allegedly directors of the company. They are admittedly not signatories in the cheques.

2. A complaint was filed by the complainant. Cognizance has been taken by the learned Magistrate. The petitioners have not entered appearance before the learned Magistrate so far. Consequently warrants of arrest have been issued against the petitioners, who are both women, having their permanent residence at Mumbai. They have come to this Court with the prayer that the prosecutions in so far as they relate to them may be quashed.

3. What are the grounds ? The learned counsel for the petitioner contends that the petitioners are not the drawers of the cheques in question and therefore they have no principal liability under Section 138 of the N.I Act. They are brought into array of accused with the help of Section 141 of the N.I Act. It is the contention of the petitioners that they are not in charge of and

responsible for the conduct of the company's affairs and in these circumstances, these prosecutions against them are unjustified and they amount to unnecessary oppression and vexation. In these circumstances powers under Section 482 Cr.P.C may be invoked to quash the prosecutions against them, it is contended.

4. The learned counsel for the respondent/complainant contends that necessary, sufficient and adequate averments have been made in the complaint justifying the court below entertaining the requisite satisfaction at the threshold that there are sufficient grounds to proceed against the accused. At this stage, meticulous evaluation of the materials is not necessary. It is not necessary to decide whether the case would end in conviction against the petitioners or not. If there is sufficient grounds to proceed against the petitioners, the course adopted by the learned Magistrate of issuing process under Section 204 Cr.P.C cannot be faulted. Powers under Section 482 Cr.P.C cannot be invoked in favour of the petitioners, it is urged.

5. The learned counsel for the respondent/complainant places particular reliance on the observation of the Supreme Court in **S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla** [(2005) 8 SCC 89]. He also places reliance on the observation of a Division Bench of this Court in **Mymoonath Beevi v. State of Kerala** [2005(4) KLT 174]. The counsel contends that if the complaint contains an averment that

the indictees concerned were in charge of and responsible to the company for the conduct of its affairs and the company is shown to have committed the offence under Section 138 of the N.I Act, cognizance has got to be taken against such partners/directors who are allegedly in charge of and responsible to the company for the conduct of its affairs. At the threshold, as unambiguously held by the Division Bench, it is not necessary to look for any other material. The learned counsel for the petitioner relies on the observations of the Division Bench in the above case and the distinction made by the Division Bench to the dictum in **Biju Jacob v. Annie Mathew** [2004 (2) KLT 634]. The counsel contends that in these circumstances, this Court may not and should not quash the complaint on the contentions raised.

6. It will be apposite at the very outset to ascertain the averments made in the complaint to drive home the charge against the petitioners, ie. accused 3 & 4. The relevant averment appears in para.8 of the complaint. I extract the same below:

> "Accused Nos.3 & 4 were/are Directors of the accused company at the relevant time of all the above stated transactions with the complainant. Accused Nos.2,3 & 4 were/are incharge and responsible to the company for the conduct of its business with complainant. They were/are also incharge and responsible to the company at the time when the above offence was committed."
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> (emphasis supplied)

7. The learned counsel for the respondent/complainant then places reliance on the dictum in **S.M.S Pharmaceuticals** supra and in particularly para.19 (a) of the said judgment. I extract the same below:

> "In view of the above discussion, our answers to the questions posed in the reference are as under:
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

The learned counsel for the petitioner further submits that there can be no trace of doubt on the law applicable in the light of the specific observations in para.20 of the decision of the Division Bench in **Mymoonath Beevi** supra. He places reliance specifically in the following passage in para.20.

> "In a case where the complaint does contain the requisite averments satisfying the requirements of S.141 of the Act, there is no warrant for insisting on any further material at the threshold stage before taking cognizance on the basis of an unnecessary distinction between `signatory' and `non signatory' to the cheque. The observations in paragraph 3 of **Biju Jacob**'s case really constitute a well deserved caution to Magistrates while taking cognizance of the offence on a complaint which falls short of the necessary averment in terms of S.141 of the Act. But paragraph 2 of that decision indicates there was in fact an averment in the complaint in terms of S.141 of the Act. Hence on the facts of that case, the

> observations in paragraph 3 were not warranted. With a view to steer clear of any confusion which those observations may create, we make it clear that the observations in paragraph 3 of **Biju Jacob**'s case will apply only in those cases where the complaint on the face of it does not contain an averment in terms of S.141 of the Act."

8. The averments in the complaint which appear in para.8, which I have already extracted above, leave no doubt that the requisite and crucial averments insisted by Section 141 of the N.I Act have been raised against the petitioners. In the light of the observation of the Division Bench that no further materials need be insisted at that stage, the contention that no materials in addition to these averments have been placed before court at the threshold is of no consequence at all. In fact, my attention has been brought to the affidavit filed along with complaint in which also, identical assertions as are extracted above from the complaint are seen repeated.

9. The learned counsel for the petitioners relies on the observation in **Shahnaz v. State of Kerala** [2005(3) KLT Short note 61] (full text reported in 2005(2) KLD 266). Counsel relies on the observation in para.28 particularly. In the light of the decision of the Division Bench, I am unable to agree that any further materials can or need be insisted by court before it takes cognizance against the indictees like the petitioners.

10. It follows that the challenge raised cannot be sustained and these petitions deserve to be dismissed.

11. The learned counsel for the petitioners submits that the petitioners are women and insistence on personal appearance of the petitioners would work out great prejudice, loss and inconvenience to the petitioners. I need only observe that the petitioners shall be at liberty to apply to the learned Magistrate for exemption from personal appearance. It has often been repeated that the criminal courts need not ritualistically insist on the personal presence of the accused persons unless their presence is necessary for further progress of the prosecution. I have no reason to assume that if the petitioners apply for exemption before the learned Magistrate, the same shall not be considered by the learned Magistrate on merits, in accordance with law and expeditiously. I need only mention that the mere pending of non bailable warrants should not and challenge need not stand in the way of the learned Magistrate in considering such application on merits.

12. These Crl.M.Cs are, in these circumstances, dismissed.

(R.BASANT, JUDGE)

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